

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

IN THE MATTER OF:

ELECTRONIC JOINT APPLICATION OF	)	
LOUISVILLE GAS AND ELECTRIC	)	
COMPANY AND KENTUCKY UTILITIES	)	
COMPANY FOR REVIEW, MODIFICATION,	)	CASE NO. 2017-00441
AND CONTINUATION OF CERTAIN	)	
EXISTING DEMAND-SIDE MANAGEMENT	)	
AND ENERGY EFFICIENCY PROGRAMS	)	

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**REPLY OF WAL-MART STORES EAST, LP AND SAM'S EAST, INC.  
TO KENTUCKY UTILITIES COMPANY AND LOUISVILLE GAS  
AND ELECTRIC COMPANY'S RESPONSE TO MOTION TO INTERVENE**

Wal-Mart Stores East, LP and Sam's East, Inc. (collectively, "Walmart"), by its attorneys, respectfully file with the Kentucky Public Service Commission ("Commission") its Reply to Kentucky Utility Company ("KU") and Louisville Gas and Electric Company's ("LG&E") (collectively, "Companies") Response to the Motion to Intervene of Walmart ("Response") in the above-captioned matter and ask that the Commission grant Walmart's intervention.

In the Response to Walmart's Motion to Intervene, the Companies argue that Walmart has not satisfied the intervention requirements set forth in 807 KAR 5:001 § 4(11)(b) on the bases that Walmart has not demonstrated a "special interest in this proceeding because Walmart's stated interests will be adequately represented by the Attorney General" and Walmart's Motion "fails to identify any relevant issues or development of relevant facts that will assist the Commission in resolution of the matter without unduly complicating and disrupting the proceedings."<sup>1</sup> As set

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<sup>1</sup> Companies' Response, p. 1.

forth in this Reply, Walmart's Motion to Intervene satisfies both elements of 807 KAR 5:001 § 4(11)(b) and should be granted.

### **INTRODUCTION**

In the Commission's Final Order in the Companies' 2014 Base Rate Case, the Commission ordered that the Companies' "first DSM//EE application after completion of the industrial DSM/EE potential study," should "set forth a *proposed* definition of the term 'industrial' as that term is used in KRS 278.285(3) and develop criteria which will be used to determine whether an industrial customer qualifies for the DSM exemption under KRS 278.285(3)."<sup>2</sup> Prior to making that filing, however, the Companies were also ordered to hold certain Advisory Group meetings to assist in the development of that criteria.

The Companies did convene such a group in 2016, which they identified as the KU/LG&E Energy Efficiency DSM Advisory Group ("Advisory Group"). Over the course of nearly 18 months, the Companies convened multiple meetings of the Advisory Group, which was comprised of parties interested in the Companies' future EE/DSM programs. As stated in its Motion to Intervene, Walmart was an active participant in those meetings.<sup>3</sup> Indeed, in reviewing the

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<sup>2</sup> In the Matter of: Application of Kentucky Utilities Company for an Adjustment of its Electric Rates and In the Matter of: Application of Louisville Gas and Electric Company for an Adjustment of its Electric and Gas Rates; Case Nos. 2014-00371 and 2014-00372, Final Order (issued June 5, 2015), p. 9 (emphasis added).

<sup>3</sup> See Updates to the Advisory Group meetings filed with the Commission in Compliance with Order, including the Sign-in Sheets for the August 24, 2016 Advisory Group meeting filed with the Commission on September 15, 2016; Sign-in Sheets for the October 13, 2016 Advisory Group meeting filed with the Commission on October 14, 2016; the Sign-in Sheets for the September 26, 2017 Advisory Group meeting filed with the Commission on October 16, 2017; and the Sign-in Sheets for the October 26, 2017 Advisory Group meeting filed with the Commission on November 15, 2017.

attendance sheets from those meetings, Walmart was the *only large, energy-intensive commercial entity or group* to participate.<sup>4</sup>

During these Advisory Group meetings, the participants discussed the requirements of KRS 278.285(3) and the parameters of an industrial opt-out. Walmart argued that it should be entitled to participate in the opt-out, particularly because it is an energy-intensive customer that takes service under certain industrial rate schedules contained in the Companies' tariffs. Walmart accordingly expressed its concerns with the industrial opt-out being proposed by the Companies during the Advisory Group meetings in large part because the definition offered at the time did not include all energy-intensive ratepayers taking service under industrial rates.

When the Companies filed their Application in this proceeding, they *proposed* a definition for the industrial opt-out. Similar to the discussions during the Advisory Group meetings, the proposed industrial opt-out would discriminate against certain energy-intensive commercial customers, like Walmart, that take service under industrial rate schedules.

As the Commission's Final Order in the 2014 Base Rate Cases required, all the Companies have done in this proceeding is make a proposal. The Commission must make the ultimate decision as to whether that proposal is just and reasonable, which includes the appropriate scope of any industrial opt-out implemented under KRS 278.285(3). As indicated by its presentation of this distinct issue in its Motion to Intervene, Walmart is prepared to present other evidence and arguments for the Commission to consider when it determines the appropriate scope of the Companies' opt-out.

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<sup>4</sup> See *id.* At the various Advisory Group meetings, other parties participated on behalf of local governments or municipalities who also take service under commercial rates, but there were no other express commercial entities or groups advocating the interests of energy-intensive, large commercial retailers like Walmart, whose interests are clearly different from those municipal and governmental entities.

## ARGUMENT

1. Walmart has presented a special and unique interest in this proceeding that is not adequately represented by any other party.

The Companies first argue that Walmart's intervention should be denied because the Attorney General would adequately represent Walmart's special interests.<sup>5</sup> In this regard, the Companies seem to suggest that Walmart does not have a special interest in this proceeding because there are "a number of commercial and other large non-industrial customers that use considerable amounts of energy."<sup>6</sup> Despite this assertion, the Companies then curiously state that Walmart's "real interest" in this proceeding is "clear," specifically, that "Walmart desires to have the right to opt out of the Companies' DSM-EE programs and charges," which the Companies conclude "contravenes KRS 278.285(3)."<sup>7</sup>

Walmart certainly agrees with the Companies that its interest in this case is in addressing the parameters of the opt-out that they propose as part of their DSM-EE programs and charges. The Companies clearly acknowledge that this is Walmart's special interest. As a large, energy-intensive commercial customer taking service under industrial rates and excluded from those opt-out parameters, this interest is real and unique. Indeed, it was an interest of Walmart's during its participation in Case Nos. 2014-00371 and 2014-00372,<sup>8</sup> and was Walmart's primary interest in actively participating in the Companies' Advisory Group meetings. Whether this interest contravenes the statute, as the Companies claim, is a question for the Commission to decide based on due process and evidence presented in the course of this case. To that end, it is also up to the

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<sup>5</sup> Companies' Response, p. 1.

<sup>6</sup> Id. at 2.

<sup>7</sup> Id. at 3.

<sup>8</sup> See Case No. 2014-00371, Direct Testimony of Walmart witness Steve W. Chriss, p. 6, lines 8-10; p. 18, line 9 to p. 22, line 23; Case No. 2014-00372, Direct Testimony of Walmart witness Steve W. Chriss, p. 6, lines 1-3; p. 16, line 1 to p. 20, line 20

Commission to determine whether the Companies' interpretation and application of the statute is improper, as Walmart will attempt to demonstrate through evidence. Regardless, if this is not a special and unique interest sufficient to satisfy the Commission's intervention standards under 807 KAR 5:0001, then Walmart does not know what would properly qualify.

The Companies' Response relies on the Commission's recent decision in a Kentucky Power Company DSM-EE matter, claiming that Walmart's interest is neither unique or special "as it is shared by numerous other non-industrial customers."<sup>9</sup> This is wrong for at least two reasons. First, as noted above, Walmart has identified specific issues with the Application filed by the Companies, specifically, "the way the Companies have defined eligibility for the industrial opt-out measure included in their DSM/EE Program Plan."<sup>10</sup> This, again, is not simply a "generalized interest in the DSM rates" of the utility.<sup>11</sup>

Second, while the Companies claim there are numerous non-industrial customers comparable to Walmart, their Response fails to name one such customer participating in this case. Ironically, however, the Companies' testimony filed in support of their Application references Walmart by name as an entity that has invested substantially in DSM-EE measures.<sup>12</sup> If Walmart was no different than other commercial customers within the service territory, there would have been no reason for the Companies to name Walmart specifically. Regardless, even if the Companies could identify one such customer, Walmart's position is still unique insofar as there was no other large, energy-intensive commercial entity or group that participated in the Advisory

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<sup>9</sup> Companies' Response, pp. 2-3.

<sup>10</sup> Walmart Motion to Intervene, ¶ 5.

<sup>11</sup> Companies' Response, p. 3.

<sup>12</sup> Direct Testimony of David Huff, p. 11.

Group meetings wherein Walmart singularly asserted its interest in the parameters of the Companies' opt-out provision.

As for the claim by the Companies that the Attorney General will adequately represent Walmart's interests, it bears repeating that Walmart has stated a unique and special interest in the proposed parameters of the DSM-EE opt-out provision that is more than just a "generalized interest in DSM service." It is Walmart's belief that the Office of the Attorney General ("OAG") has a statutory obligation to represent the general interests of ratepayers, as a whole, and will not advocate any party's individual and unique interests. To that end, counsel for the OAG has confirmed this belief and has conveyed to Walmart's counsel that the OAG has no interest or intent in this proceeding to advocate Walmart's stated interest in seeking modification of the parameters of the Companies' proposed DSM-EE opt-out provision. Indeed, counsel for the OAG has indicated that the OAG's interest on this issue may be contrary to Walmart's litigation position. Thus, there is no basis to believe that the Attorney General would represent Walmart's interests in this proceeding, as the Companies suggest.<sup>13</sup>

Walmart therefore has a unique interest in the industrial opt-out proposed by the Companies that cannot and will not be adequately represented by the Attorney General or any other party. As such, Walmart satisfies the requirements for intervention set forth in 807 KAR 5:001 § 4(11)(b).

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<sup>13</sup> The divergence between the interests promoted by the Attorney General and Walmart were seen as recently as December 2017 in the Kentucky Power Company rate case, wherein the OAG and Walmart took opposition positions on the settlement reached in that case. See Electronic Application of Kentucky Power Company for (1) a General Adjustment of its Rates for Electric Service; (2) an Order Approving its 2017 Environmental Compliance Plan; (3) an Order Approving its Tariffs and Riders; (4) an Order Approving Accounting Practices to Establish Regulatory Assets and Liabilities; and (5) an Order Granting All Other Required Approvals and Relief; Case No. 2017-00179. Walmart was a signatory party to the settlement filed in that case, whereas the OAG opposed the settlement.

2. *The meaning of "industrial customer" under KRS 278.285(3) is ambiguous.*

As noted above, the Companies are correct that Walmart has proposed that the opt-out referenced in KRS 278.285(3) include customers such as Walmart who take service pursuant to industrial rate schedules and have similar energy usage levels to other customers taking service under other industrial rate schedules.<sup>14</sup> In their Response, the Companies present a substantive argument concerning the appropriate definition of the word "industrial customer" as set forth in KRS 278.285(3).<sup>15</sup> Although this argument is better left to the Companies' post-hearing brief based on a fully developed factual record, Walmart will briefly respond.

As it presently stands, KRS 278.285(3) references the phrase "industrial customer." That phrase is neither capitalized nor defined. Although the Companies argue that the General Assembly "made a decision" that the opt-out is limited to industrial customers as defined by the Companies, such argument is not supportable. The General Assembly did not define "industrial customer" in the legislation, and there are multiple ways to interpret that phrase, including, but not limited to, a reasonable interpretation based on generally understood customer classifications contained in the Companies' tariffs. In the absence of clear guidance from the General Assembly, the ultimate interpretation of KRS 278.285(3) and the phrase "industrial customer" for the purpose of implementing a utility's DSM-EE programs and rates is best left to this Commission. The Companies' conclusory statements of what may or may not "contravene" the statute should not simply be accepted without due process.

Walmart seeks to intervene in this proceeding precisely because the Companies have elected to structure the parameters of their proposed opt-out provision based on an interpretation

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<sup>14</sup>Companies' Response, p. 3.

<sup>15</sup> Id. at 4.

of the term "industrial customer" that is not clearly defined in the statute. Where, as on the Companies' system, large energy-intensive commercial users of electricity take service under industrial rate schedules, Walmart legitimately questions whether some industrial rate schedule customers should be able to take advantage of the opt-out while others similarly situated should not. By permitting Walmart to participate in this case, the record can be more fully developed so that the Commission can determine whether the definition *proposed* by the Companies in this Application is just, reasonable, and non-discriminatory.

3. *Walmart's participation will not unduly complicate these proceedings.*

On the question of administrative efficiency, the Companies do not actually argue that Walmart will complicate the proceedings. Rather, the Companies merely restate the arguments previously made in their Response. This is insufficient to show that Walmart might somehow unduly complicate or disrupt the proceedings. Indeed, as set forth in this Reply, Walmart's participation will do quite the opposite. Walmart intends to present facts and evidence concerning the scope of the industrial opt-out set forth in KRS 278.285(3), which is obviously an element of the Companies' DSM-EE program Application and thus an issue offered for review by the Commission. Such evidence will be presented within the timeframe and parameters set forth in the Commission's rules and as required by the scheduling order entered in this case. By receiving into evidence testimony as to the possible meanings of "industrial customer" for implementation in the DSM-EE program, the Commission can develop a complete, fair record and can issue a decision that gives consideration to the positions of all interested parties, ensuring that the Companies' tariff provisions and the resulting rates paid by customers are just, reasonable, and non-discriminatory. The Commission is certainly free to ultimately reject Walmart's arguments in



this regard, but it should do so based upon evidence presented by the parties in the course of a due process proceeding, and not based on assertions made by the Companies in procedural filings.

## CONCLUSION

Because Walmart has satisfied both of the required bases for intervention as set forth in 807 KAR 5:001 § 4(11)(b), its Motion to Intervene should be granted.

Respectfully submitted,

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### CERTIFICATE OF SERVICE

I hereby certify that Walmart's January 22, 2018, electronic filing is a true and accurate copy of the Reply of Wal-Mart Stores East, LP and Sam's East, Inc. to Kentucky Utilities Company and Louisville Gas and Electric Company's Response to Motion to Intervene to be filed in paper medium; and that on January 22, 2018, the electronic filing has been transmitted to the Commission, and that an original and six copies of the filing will be delivered to the Commission, that no participants have been excused from electronic filing at this time, and served upon the following via Electronic Mail:

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